FEDERAL CONSISTENCY REQUIREMENTS*

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INTRODUCTION

This document provides an overview of the Coastal Zone Management Act (CZMA) federal consistency requirement and is the principle document used in the Office of Ocean and Coastal Resource Management's (OCRM's) Federal Consistency Workshops. For more detailed information and to fully comply with CZMA requirements, *see* **CZMA section 307 (16 USC § 1456)** and the National Oceanic and Atmospheric Administration's (NOAA's) **federal consistency regulations, 15 CFR part 930**. This document, the contents of OCRM's Federal Consistency Workbook and other information is located on OCRM's Federal Consistency web page at:

www.coastalmanagement.noaa.gov/czm/federal_consistency.html

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The CZMA was enacted on October 27, 1972, to encourage coastal states, Great Lake states, and United States Territories and Commonwealths (collectively referred to as "coastal states" or "states") to be proactive in managing natural resources for their benefit and the benefit of the Nation. The CZMA recognizes a national interest in the resources of the coastal zone and in the importance of balancing the competing uses of those resources. The CZMA is a voluntary program for states. If a state elects to participate it must develop and implement a coastal management program (CMP) pursuant to federal requirements. *See* CZMA section 306(d); 15 CFR part 923. State CMPs are comprehensive management plans that describe the uses subject to the management program, the authorities and enforceable policies of the management program, the boundaries of the state's coastal zone, the organization of the management program, and related state coastal management concerns. The state CMPs are developed with the participation of Federal agencies, state and local agencies, industry, other interested groups and the public. Thirty-five coastal states are eligible to participate in the federal coastal management program. Thirty-four of the eligible states have federally approved CMPs. Illinois is not currently participating.

The CZMA federal consistency provision is a cornerstone of the CZMA program and a primary incentive for states' participation. Federal consistency provides states with an important tool to manage coastal uses and resources and to facilitate cooperation and coordination with Federal agencies. Federal consistency is a limited waiver of federal supremacy and authority. Federal agency activities that have coastal effects must be consistent to the maximum extent practicable with the federally approved enforceable policies of a state's CMP. In addition, non-federal applicants for federal authorizations and funding must be fully consistent with the enforceable policies of state CMPs.

Federal consistency reviews are the responsibility of the lead state agency that implements or coordinates the state's federally approved CMP. At the federal level, OCRM, within NOAA's Ocean Service, among other duties and services, interprets the CZMA and oversees the application of federal consistency; provides management and legal assistance to coastal states, Federal agencies, Tribes and others; and mediates CZMA related disputes. NOAA's Office of General Counsel for Ocean Services assists OCRM and processes appeals to the Secretary of Commerce.

Recent revisions to the regulations were promulgated at 65 *Federal Register* 77123-77175 (December 8, 2000), and were published in the Code of Federal Regulations on January 1, 2001. The new rules took effect on January 8, 2001. The preamble to the final rule published on December 8, 2000, also contains substantial information regarding federal consistency. The Conference Report to the 1990 amendments to the CZMA (Pub. L. No. 101-508) is a primary legislative source for some of the revisions to the regulations. The Conference Report is discussed in the preamble to the December 8, 2000, final rule and can also be located at, H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess., 970-972 (Conference Report).

DEFINITION

Federal consistency is the CZMA requirement that ***federal actions*** that have reasonably foreseeable ***effects*** on any ***land or water use*** or ***natural resource*** of the coastal zone (also referred to as coastal uses or resources, or coastal effects) must be consistent with the ***enforceable policies*** of a coastal state's federally approved CMP.

Federal actions: There are four basic types of federal actions: Federal agency activities, federal license or permit activities, outer continental shelf (OCS) plans, and federal financial assistance to state and local governments.

1. ***Federal agency activities*** – activities and development projects performed by a Federal agency, or a contractor for the benefit of a Federal agency.

   E.g., Fisheries Plans by the National Marine Fisheries Service, Naval exercises, the disposal of federal land by the General Services Administration, a U.S. Army Corps of Engineers (Corps) breakwater or beach renourishment project, an OCS oil and gas lease sale by the Minerals Management Service (MMS), improvements to a military base, Naval disposal of radioactive or hazardous waste performed by a private contractor, activities in National Parks such as installation of mooring buoys or road construction;

2. ***Federal license or permit activities*** – activities not performed by a Federal agency, but requiring federal permits, licenses or other forms of federal approval.

   E.g., activities requiring Corps 404 permits, Corps permits for use of ocean dump-sites, Nuclear Regulatory Commission licenses for nuclear power plants, licenses from the Federal Energy Regulatory Commission (FERC) for hydroelectric facilities;

3. ***OCS plans*** – MMS approvals for OCS plans, pursuant to the Outer Continental Shelf Lands Act. The CZMA process is similar to federal license or permit activities.

4. ***Federal financial assistance to state and local governments***.

   E.g., Federal Highway Administration funds to coastal state and local governments, construction grants for wastewater treatment works, hazardous waste management trust fund, Housing and Urban Development grants.

Coastal Effects:

At the heart of federal consistency is the "effects test." The CZMA was amended in 1990 to,

> establish[] a generally applicable rule of law that any federal agency activity (regardless of its location) is subject to [the consistency requirement] if it will ***affect*** any natural resources, land uses, or water uses in the coastal zone. No federal agency activities are categorically exempt from this requirement.

Conference Report at 970. The new effects language was added to replace previous language that referred to activities "directly affecting the coastal zone." It also reflects Congressional intent to overturn *Secretary of the Interior v. California*, 464 U.S. 312 (1984), and further to:

> eliminate "categorical exemptions" from consistency, and instead to establish a uniform threshold standard requiring federal agencies to make a case-by-case factual determination of reasonably foreseeable effects on the coastal zone. The amendments to section 307(c)(1) were intended to leave no doubt that all federal agency activities meeting the "effects" standard are

> subject to the CZMA consistency requirement; that there are no exceptions or exclusions from the requirement as a matter of law; and that the new "uniform threshold standard" requires a factual determination, based on the effects of such activities on the coastal zone, to be applied on a case-by-case basis.

Id. at 970-71; 136 Cong. Rec. H 8076 (Sep. 26, 1990). The Conference Report provides further clarification as follows:

> The question of whether a specific federal agency activity may affect any natural resource, land use, or water use in the coastal zone is determined by the federal agency. The conferees intend this determination to include effects in the coastal zone which the federal agency may reasonably anticipate as a result of its action, including cumulative and secondary effects. Therefore, the term "affecting" is to be construed broadly, including direct effects which are caused by the activity and occur at the same time and place, and indirect effects which may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

These concepts are key to the effectiveness of the CZMA to allow states to balance resource protection with development in the coastal zone and are embodied in the revised federal consistency regulations.

Enforceable policies:

An enforceable policy is a state policy that is legally binding under state law (e.g., through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions), and by which a state exerts control over private and public coastal uses and resources, and which are incorporated in the state's federally approved CMP. CZMA section 304(6a). This means that enforceable policies must be limited to a state's jurisdiction and must be given legal effect by state law and cannot apply to federal lands, federal waters, federal agencies or other areas or entities outside the state's jurisdiction, unless authorized by federal law.

OCRM must approve all enforceable policies that a state wants to include in its CMP. Any substantive change to approved enforceable policies must also be submitted for OCRM approval. This is required by CZMA sections 306(d) and 306(e) and serves an important notice and review purpose in the CZMA state-federal partnership. In return for the federal consistency authority granted to states, federal agencies are provided with substantial opportunity to review and comment on the development of a state's CMP and on subsequent changes to the CMP. This also means that a policy cannot become an enforceable policy of a state's CMP by "incorporation by reference." For example, an enforceable policy "A" that is referenced in another enforceable policy "B," where B has been approved by OCRM, but A has not, does *not* become an enforceable policy of the state's federally approved CMP because it is referenced in OCRM-approved policy B. Policy A has not gone through the program change approval process, giving OCRM, Federal agencies and the the public an opportunity to comment. Policy A would have to be submitted to OCRM for approval in its entirety pursuant to NOAA's program changes regulations, 15 CFR part 923, subpart H, and OCRM's *Program Change Guidance* (July 1996) to become an enforceable policy of the state's federally approved CMP.

Early coordination and identification of applicable state CMP enforceable policies is key to ensuring that Federal agencies and applicants address state policies and issues. Early coordination will also help determine what measures, if any, need to be taken so that the activity is consistent with the state policies.

OCRM will determine whether a particular enforceable policy can be approved under OCRM's program change regulations (15 CFR part 923, subpart H) and OCRM's *Program Change Guidance* (July 1996). In particular, OCRM must ensure that enforceable policies proposed by coastal States meet all four of the following CZMA requirements:

1. Are legally binding under state law and apply only to areas and entities within the state's jurisdiction. CZMA section 304(6a).

   For example, a wetlands protection policy in a state statute, regulation or in the state's CMP program document is an enforceable policy only if the statute or regulation contains a mechanism that imposes the policy on the public and private uses within the state's jurisdiction. This could be a state permit program or a provision in the state law that requires all state agencies to apply the policy in their permit and enforcement actions. A policy in the state's CMP program document must also be linked to such a statutory or regulatory enforceable mechanism.

   In another example, a state law that says the state's CZMA federal consistency decision can only be issued by a state permit would not apply to Federal agency activities under CZMA section 307(c)(1). While the state law is a valid enforceable policy of the state's CMP, it would only apply to areas under the state's jurisdiction. Since neither the CZMA nor OCRM's approval of the policy authorize the application of state permit requirements to Federal agencies, the policy would not apply to the federal consistency process or state's consistency decision for Federal agency activities. The policy could, however, apply to the federal consistency process for federal license or permit activities where the proposed activity is located within the state's jurisdiction.

   The CZMA does not authorize states to establish regulatory standards for Federal agencies. A state policy that purports to regulate or otherwise establish standards for Federal agencies or federal lands or waters would not meet the CZMA's definition of "enforceable policy," which requires that state polices be legally binding under state law. CZMA section 304(6a). The CZMA allows states to apply their federally approved enforceable policies through CZMA federal consistency reviews. Federal agencies must be consistent to the maximum extent practicable and applicants for federal approvals must be fully consistent with the enforceable policies.

2. Are not preempted by Federal law. *See* OCRM's *Program Change Guidance*, section II.D.

   NOAA cannot approve state policies containing requirements that, on their face, are preempted by Federal law. For example, North Carolina sought to regulate low level aircraft in flight by adopting policies that described specific standards preempted by Federal law administered by the Federal Aviation Administration. The state sought to impose minimum altitude and decibel levels, and other overflight restrictions. NOAA denied the state's request to incorporate these policies into the North Carolina CMP because the policies were, on their face, preempted. Thus, North Carolina could not use the policies for CZMA federal consistency purposes.

   So long as a state's enforceable policies do not specifically describe preempted restrictions the state may apply them through the federal consistency process to interstate pipeline projects. For example, a state may implement enforceable wetland protection policies, but not impermissible regulations for interstate pipeline safety, which are the exclusive province of the Federal Energy Regulatory Commission under the Natural Gas Act. If a pipeline were to impact state wetlands,

then the applicant must be consistent with the state wetland policies. Thus, mitigation may be required or, if mitigation is not available, then the siting of a pipeline may need to be altered, not because the state is attempting to regulate the pipeline, but to address effects to coastal wetlands through the federal CZMA scheme.

3. Would be applied to all relevant public and private entities and would not discriminate against a particular type of activity, or, even if neutrally written, against a particular Federal agency. *Id.*

   State policies should, to the greatest extent possible, be based on effects to coastal uses or resources and not on a particular type of activity. This ensures that the policy is applicable to any type of activity that has coastal effects and will not discriminate against a particular user group. For example, a state was concerned with possible impacts from offshore oil and gas development on specific fishing areas and on discharges that might follow ocean currents and eddies into the state's estuarine areas. The state proposed oil and gas specific energy policies. OCRM could not approve the policies because they imposed requirements on one user group, when other types of activities might have the same coastal impacts. The state re-wrote the policies to be based on coastal impacts and information needs to assess such impacts. Now the policies are applicable to all OCS energy projects and other activities having similar effects.

4. Are consistent with CZMA requirements on the State's use of federal consistency. *Id. See also id.* at Appendix B.5. (federal consistency procedures).

   When state policies are proposed to be added to a CMP, the state must ensure that the CMP continues to balance the objectives of the CZMA and to continue to give priority consideration to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation. CZMA section 303(2)(D). Policies affecting these "national interest" have significant implications for federal consistency. For example, a state has a law that opposes all offshore oil and gas development. The policy is not, however, part of the state's federally approved CMP. OCRM determined that such a policy would substantially affect the state's obligation to consider the national interest in energy facility siting. Thus, even if the state submitted such a change to its CMP as an amendment, and not a routine change, it is not clear that OCRM could approve such a change.

   In addition, state enforceable policies cannot be written in such a way that would require a Federal agency to redefine an activity proposed by a Federal agency in such a way that is not related to the intended purpose of the Federal agency's proposed action. For Federal agency activities under CZMA section 307(c)(1), states review activities and development projects that are *proposed* by a Federal agency. 15 CFR § 930.36(a). *See also, e.g.,* 15 CFR §§ 930.35, .39(a), .46(a), .1(c), .11(d); 65 Fed. Reg. 77130, Col. 2-3 (December 8, 2000) (preamble to final 2000 rule). For example, a state proposed a policy that, when dredged material is not suitable for beach renourishment, would require a dredger to obtain suitable material from a location not related to the dredging to renourish the beaches. OCRM could not approve the policy as written because it would essentially redefine the Army Corps of Engineers dredging project to a beach renourishment project that is not related to the dredging. The policy had to be re-written to tie the beach renourishment and the alternate source of material to mitigate impacts to coastal uses or resources resulting from the proposed dredging (where such alternatives/conditions are based on approved enforceable policies).

Coastal uses: Some examples of coastal uses include such activities as: public access, recreation, fishing, historic or cultural preservation, development, energy infrastructure and use, hazards management, marinas, floodplain management, scenic and aesthetic enjoyment, and resource creation or restoration projects.

Coastal resources: Coastal resources include biological or physical resources that are found within a state's coastal zone on a regular or cyclical basis. Biological and physical resources include, but are not limited to, air, tidal and nontidal wetlands, ocean waters, estuaries, rivers, streams, lakes, aquifers, submerged aquatic vegetation, land, plants, trees, minerals, fish, shellfish, invertebrates, amphibians, birds, mammals, and reptiles, etc.

BENEFITS

Federal consistency is an important mandatory, but flexible mechanism to foster consultation, cooperation, and coordination between states and Federal agencies. Federal consistency is more than just a procedural dictate. It helps ensure the balanced use and protection of coastal resources through state CMP policies.

To maximize the benefits of federal consistency, Federal agencies need to provide routine notification to coastal states of actions affecting the coastal zone, and coastal states need to pay attention to proposed federal actions, develop adequate consistency procedures, and notify Federal agencies, other state agencies, and others of a state's assertion of consistency. If a CMP is not receiving notice of federal activities affecting the coastal zone, then the CMP needs to address this issue with each Federal agency. States need to make connections with the Federal agencies, inform them of the federal consistency requirements, possibly develop memoranda of understanding (MOUs), ensure that the CMP obtains notice, and respond when the CMP does receive notice. In summary, Federal agencies and others have an affirmative duty to comply with the federal consistency requirements, but states need to take consistent and assertive steps.

Federal consistency provides Federal agencies with an effective mechanism to document coastal effects and to address state coastal management concerns. Moreover, compliance with the consistency requirement complements National Environmental Policy Act (NEPA) requirements. Even though the CZMA effects test is different than NEPA's and the CZMA requires Federal agencies to alter projects to be consistent with state CMP policies, NEPA is an effective delivery mechanism for federal consistency and often provides necessary background information.

Early attention to federal consistency can provide the Federal agency with state CMP and public support and a smooth and expeditious federal consistency review. Early consultation and cooperation between Federal agencies and state CMPs can help Federal agencies avoid costly last minute changes to projects in order to comply with state CMP policies. For example, to avoid issues on specific projects, the Alaska CMP and MMS developed an MOU that specifies the process for consistency reviews of OCS oil and gas lease sales and approvals, and Alaska and the Forest Service established a similar MOU for Timber Sales.

States concur with approximately 93-95% of all federal actions reviewed. Maintaining this percentage means that states and Federal agencies need to know their consistency responsibilities and to develop cooperative relationships to foster effective coordination and consultation.

NATIONAL INTEREST SAFEGUARDS

Federal consistency gives states substantial input into federal actions affecting the coastal zone. There are, however, safeguards which balance state coastal management objectives with the importance of federal activities and to ensure that the national interest in the CZMA objectives are furthered. These safeguards include:

Consistency must be based on coastal effects. While the federal consistency effects test covers a wide range of federal actions, federal consistency review is triggered only when it is reasonably foreseeable that the federal action will have coastal effects, referred to as the "effects test." Consistency does *not* apply to every action or authorization of a Federal agency, or of a non-federal applicant for federal authorizations. States only review federal actions that have reasonably foreseeable coastal effects. For Federal agency activities, Federal agencies make this determination of effects. For federal license or permit activities and federal financial assistance activities, OCRM makes the determination of effects by approving the ***lists*** of federal authorizations and financial assistance programs that a state wishes to include in its CMP. In order to be on the list, the types of activities covered by the federal authorization or funding program must be expected to have coastal effects on a routine basis. Federal agencies and other interested parties have input into OCRM's approval of such lists and additions to the lists. If a state wishes to review an ***unlisted*** federal license or permit activity, it must notify the applicant and the Federal agency and seek OCRM approval to review the activity. OCRM's decision is based on whether the unlisted activity will have reasonably foreseeable coastal effects and, again, OCRM seeks input from the Federal agency and the applicant.

Federally approved programs and state CMP enforceable policies. OCRM, with substantial input from Federal agencies, local governments, industry, non-governmental organizations and the public, must approve state CMPs and their enforceable policies, including subsequent changes to a state's CMP. OCRM's required approval ensures consideration of Federal agency activities and federal license or permit activities, including OCS plans. For example, OCRM has denied state requests to include policies in its federally approved CMP that would prohibit all oil and gas activities off its coast because such policies conflict with the CZMA requirements to consider the national interest in energy development, *see* CZMA sections 303(2)(D) and 306(d)(8), and to balance resource protection with coastal uses of national significance.

Consistent to the maximum extent practicable (Federal agency activities). Federal agency activities (CZMA § 307(c)(1)) to be fully consistent unless federal legal requirements prohibit full consistency. This ensures that Federal agencies are able to meet their legally authorized mandates, even though the activity may not be consistent with a state's enforceable policy. If a Federal agency has the discretion to meet a state's enforceable policy, then it needs to be consistent with that policy. However, federal law may limit a Federal agency's discretion and, thus, a Federal agency's administrative record may dictate an action that is not fully consistent with a state's policy. Thus, For Federal agency activities under CZMA section 307(c)(1), a Federal agency may proceed with the activity over a state's objection if the Federal agency determines its activity is consistent to the maximum extent practicable with the enforceable policies of the state's CMP.

For example, this means that even if a state objects, the Minerals Management Service (MMS) may proceed with an OCS lease sale when MMS provides the state with the reasons why the Outer Continental Shelf Lands Act (OCSLA) and MMS's administrative record supporting the lease sale decision prohibits MMS from fully complying with the state's enforceable policies. Under NOAA's

regulations, the consistent to the maximum extent practicable standard also allows Federal agencies to deviate from State enforceable policies and CZMA procedures due to "exigent circumstances." An exigent circumstance is an emergency or emergency-like or unexpected situation requiring the Federal agency to take quick or immediate action.

In addition, MMS could also proceed if it determined that its activity was *fully* consistent with the State's enforceable policies. *See* 15 CFR § 930.43(d). In either case, the Federal agency must provide the state CMP agency with a written notice that it is proceeding over the state's objection and explaining why the activity is consistent to the maximum extent practicable and/or fully consistent.

Consistent to the maximum extent practicable and exigent circumstances refers to consistency with a state CMP's substantive requirements as well as the procedural requirements of NOAA's regulations. There may be times that a federal legal requirement or an emergency situation requires a Federal agency to act sooner than the end of the 90-day consistency period. In such cases, the Federal agency needs to consult with the state CMP as early as possible.

A Federal agency cannot use a lack of funds as a basis for being consistent to the maximum extent practicable. Thus, Federal agencies are encouraged to consult early with state CMPs to ensure that the Federal agency has budgeted for meeting state CMP enforceable policies.

Appeal state objection to Secretary of Commerce (Non-Federal only). Non-federal applicants for federal license or permits and state and local government applicants for federal financial assistance may appeal a state's objection to the Secretary of Commerce. The Secretary overrides the state's objection if the Secretary finds that the activity is consistent with the objectives or purposes of the CZMA or is necessary in the interest of national security. If the Secretary overrides the state's objection, then the Federal agency may issue its authorization. The Secretarial appeal process is discussed in more detail later in this document. There is also a data base of all appeals filed with the Secretary on OCRM's Federal Consistency web page: **www.coastalmanagement.noaa.gov/czm/federal_consistency.html**

Presidential exemption (Federal agency activities). After any appealable final judgement, decree, or order of any Federal court, the President may exempt from compliance the elements of a Federal agency activity that are found by a Federal court to be inconsistent with a state's CMP, if the President determines that the activity is in the paramount interest of the United States. CZMA § 307(c)(1)(B). This exemption was added to the statute in 1990 and has not yet been used.

Mediation by the Secretary or OCRM. Mediation has been used to resolve federal consistency disputes and allowed federal actions to proceed. In the event of a serious disagreement between a Federal agency and a state, either party may request that the Secretary of Commerce mediate the dispute. NOAA's regulations also provide for OCRM mediation to resolve disputes between states, Federal agencies, and other parties.

BASIC FEDERAL CONSISTENCY PROCEDURES

Two important things to keep in mind to facilitate consistency reviews is for the Federal agency, state CMP, and applicant to discuss a proposed activity as early in the process as possible, and that state CMPs and Federal agencies can agree, at any time, to more flexible consistency review procedures (providing public participation requirements are still met).

See Appendix A for a chart summary of the consistency requirements, and Appendices B and C for flow charts for Federal agency activities and Federal license or permit activities.

Federal Agency Activities and Development Projects

Federal agencies proposing an activity need to follow the requirements of CZMA section 307(c)(1), (2)(16 USC § 1456(c)(1), (2)) and 15 CFR part 930, subparts A, B and C. The basic requirements for Federal agency activities are:

1. Federal development projects *inside* a state's coastal zone are automatically subject to consistency and require that a Consistency Determination be submitted to the state CMP.

2. Federal agency determines if federal activity (in or outside coastal zone) and development projects outside coastal zone will have reasonably foreseeable coastal effects. States are encouraged to list activities that are expected to affect coastal uses or resources in their approved CMPs, and to monitor unlisted activities and to notify Federal agencies when an unlisted activity requires consistency review.

   However, the listing/unlisted provisions in NOAA's regulations are recommended procedures for facilitating state-federal coordination. Whether or not an activity is listed, it is the Federal agency's responsibility to provide state CMPs with Consistency Determinations (CD's) for Federal agency activities affecting the coastal zone. Because Federal agencies have an affirmative statutory duty to provide states with CD's for activities with reasonably foreseeable coastal effects and because the statute requires state CMP agencies to provide an opportunity for public input into the state's consistency decision, the state cannot relieve the Federal agency or itself of consistency obligations by listing or not listing a Federal agency activity. If a state and/or a Federal agency believe that a type of Federal agency activity should not be subject to federal consistency, then they must use the applicable provisions provided in NOAA's regulations: general permits (§ 930.31(d)); *de minimis* activities (§ 930.33(a)(3)); environmentally beneficial activities (§ 930.33(a)(4)); or general consistency determinations (§ 930.36(c)).

3. The Federal agency should contact the state CMP at the earliest possible moment in the planning of the activity to ensure early state-Federal coordination and consultation.

4. If coastal effects are reasonably foreseeable, then Federal agency submits a Consistency Determination (CD) to state CMP at least 90 days before activity starts. While the form of the CD may vary, it must include a detailed description of the proposed activity, its expected coastal effects, and an evaluation of the proposed activity in light of the applicable enforceable policies in the state's CMP. The Federal agency is *not* required to submit anything beyond that required by 15 CFR § 930.39 and may submit that information in any manner it chooses. Moreover, the

CZMA does not require Federal agencies to obtain state or local permits.

Once a complete CD has been received by a state CMP, the state cannot delay the start of the 90-day CZMA review period by requiring information that is in addition to the information required by § 930.39 or that the Federal agency apply for or obtain a state permit. If the state CMP agency believes that the information required by § 930.39 has not been submitted, it must immediately notify the Federal agency.

5. If no effects, Federal agency may have to provide a Negative Determination.

6. State CMP has 60 days (plus appropriate extensions) to concur with or object to the Federal agency's CD. The state CMP agency and the Federal agency may agree to alternative time period. Any such agreement should be set forth in writing so that it is clear there is a meeting-of-the-minds between the state and the Federal agency. Ideally, the written agreement should be one document that both parties sign. The written agreement should refer to a specific end date and should not be written to require a later event or condition to be satisfied.

7. The state CMP must provide for public comment on the state's consistency review. The state cannot rely on the Federal agency notice, unless the Federal agency notice specifically says that comments on the ***state CMP's consistency review*** should be sent to the state CMP agency.

8. State concurrence is presumed if the state does not meet time frames.

9. If the state CMP agrees with the CD, then the Federal agency may immediately proceed with the activity. If the state objects, then the state's objection must describe how the proposed activity is inconsistent with specific enforceable policies of the federally approved CMP. In the event of an objection, the state CMP and Federal agency should attempt to resolve any differences during the remainder of the 90-day period. If resolution has not been reached at the end of the 90-day period the Federal agency should consider postponing final federal action until the problems have been resolved. However, at the end of the 90-day period the Federal agency may, notwithstanding state CMP objection, proceed with the activity only if the Federal agency clearly describes, in writing, to the state CMP how the activity is consistent to the maximum extent practicable and/or fully consistent, *see* discussion of consistent to the maximum extent practicable under "National Interest Safeguards."

10. If there is a dispute between a Federal agency and state CMP, either party may seek mediation by OCRM or the Secretary of Commerce (the Secretary's mediation is a more formal process).

Federal License or Permit Activities

A private individual or business, or a state or local government agency, or any other type of non-federal entity, applying to the federal government for a required permit or license or any other type of an approval or authorization, needs to follow the requirements of CZMA section 307(c)(3)(A)(16 USC § 1456(c)(3)(A)) and 15 CFR part 930, subparts A, B and D. This includes American Indian and Native Alaskan entities applying for federal authorizations.[1]

There are essentially four elements needed to determine that an authorization from a Federal agency is a "federal license or permit" within the meaning of the CZMA and therefore subject to federal consistency review. First, federal law must require that the applicant obtain the federal authorization. Second, the purpose of the federal authorization is to allow a non-federal applicant to conduct a proposed activity. Third, the activity proposed must have reasonably foreseeable effects on a state's coastal uses or resources, and fourth, the proposed activity was not previously reviewed for federal consistency by the state CMP agency (unless the authorization is a renewal or major amendment pursuant to § 930.51(b)). All four of these elements are required to trigger federal consistency review. These four elements are embodied in NOAA's regulations as discussed below:

1. State CMP, with OCRM approval, determines effects:
    a. listed v. unlisted activity.
    b. inside v. outside coastal zone.

All federal license or permit activities occurring in the coastal zone are deemed to affect coastal uses or resources, if the state CMP has *listed* the particular federal license, permit, or authorization in its federally approved CMP document. The lists may be updated through OCRM's program change process. Prior to submitting the updated list to OCRM the state must consult with the relevant Federal agency.

For a *listed* activity occurring *in the coastal zone*, the applicant must submit a Consistency Certification to the approving Federal agency and the state CMP. In addition to the Certification, the applicant must provide the state with the *necessary data and information* required by NOAA's regulations at 15 CFR § 930.58, to allow the state to assess the project's effects. This information will usually be contained in the applicant's application to the Federal agency, but may include other information required by the state CMP, if the information requirement is *specifically included in the state's federally approved CMP document and identified as "necessary data and information."* If a state wants to require information in addition to that required by NOAA in § 930.58(a) prior to starting the six-month review period, the state must amend its CMP to identify specific "necessary data and information" pursuant to § 930.58(a)(2).

For *listed* activities, *outside the coastal zone*, the applicant must submit a Consistency Certification to the state CMP and the Federal agency if the activity falls within the *geographic location* described in the

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[1] NOAA's regulations do not specifically include American Indians and Native Alaskans in the definition of applicant, *see* 15 CFR § 930.52. However, the statute has been interpreted by OCRM and federal courts to apply to American Indians and Native Alaskans. *See Narragansett Indian Tribe of Rhode Island v. The Narragansett Electric Comp.*, 878 F. Supp. 349, 362-365 (D. RI 1995), *upheld on other grounds,* 89 F.3d 908 (1st Cir. 1996). Since the statute has been found to include American Indians, specifically including American Indians and Native Alaskans in NOAA's regulations is not necessary.

state CMP document for listed activities outside the coastal zone. For listed activities outside the coastal zone where the state has *not* described the geographic location, the state CMP must follow the unlisted activity procedure described below, if it wants to review the activity.

An applicant may also be required to submit a Consistency Certification to the state CMP for *unlisted activities*. For unlisted activities, in or outside the coastal zone, the state CMP must notify the applicant, the relevant Federal agency, and OCRM that it intends to review the activity. OCRM must approve the state's consistency review. The state CMP must make this notification within 30 days of receiving notice of the activity, otherwise the state waives its consistency rights. The waiver does not apply where the state CMP does not receive notice (notice may be actual or constructive).[2] The applicant and the Federal agency have 15 days from receipt of the state CMP's request to provide comments to OCRM. OCRM will make a decision usually within 30 days of receipt of the state's request. The basis for OCRM's decision will be whether the proposed activity will have reasonably foreseeable coastal effects. The Federal agency may not approve the activity until the consistency process is complete.

2. Applicant for any required federal approval must submit a Consistency Certification and necessary data and information to the state CMP. State CMP agency should clearly document when this date occurs. State CMP agency also needs to adhere to the 30-day time period in which to notify the applicant and Federal agency that the submission does not include the necessary data and information. Otherwise, the six-month review period begins when the state CMP agency received the applicant's initial CZMA submission, regardless of whether the submission contained all necessary data and information.

3 Under no circumstances can the six-month review period begin if the applicant has not submitted the Consistency Certification.

4. State CMP has six months to respond, but must notify applicant if review will go beyond three months.

5. Applicant and state CMP agency may agree to stay the six-month review period. The regulations

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[2] Constructive notice is provided if it is published in an official federal public notification document or through an official state clearinghouse. For either form of notice, the notice shall contain sufficient information for the state CMP agency to learn of the activity, determine the activity's geographic location, and determine whether coastal effects are reasonably foreseeable.

A newspaper article can provide notice if the article contains all of the information required by 15 CFR § 930.54(a)(2) and is provided to the state CMP agency. However, even assuming a newspaper article, or other similar form of notice, describes the activity and its location with sufficient specificity for the state to determine whether coastal effects are reasonably foreseeable, such notice would only be sufficient if it also verified that an application was received by a Federal agency. For example, receipt of an application would be verified if a Federal agency spokesperson was quoted in the article stating that the agency had received the application for the federal authorization. Statements by other sources as to whether the Federal agency received the application would be speculative. If a statement by a Federal official is not in the article, then once the state CMP agency read the article, it would need to verify whether the Federal agency received the application to determine whether to seek review of the activity. The 30-day notification period would begin when the state CMP agency verified that a federal application was filed.

currently allow the applicant and the state to also "extend" the six-month review period, but OCRM strongly recommends that such agreements "stay" the review period. The stay would "toll" the running of the six-month review period for an agreed upon time ending on a specific date, after which the remainder of the six-month review period would continue. Such agreements must be set forth in writing so that it is clear there is a meeting-of-the-minds between the state and the applicant. Ideally, the written agreement should be one document that both parties sign. The written agreement for a stay should refer to a specific end date and should not be written to require a later event or condition to be satisfied to end the stay. **If a state objects to an applicants project and the applicant appeals to the Secretary of Commerce, failure to follow these instructions could result in the Secretary overriding the state's objection because the state's objection was issued after the six-month review period due to an unsupportable stay or extension agreement.**

6. The state must provide for public comment (state can require applicant to publish notice or may combine notice with Federal agency, if Federal agency agrees).

7. State concurrence presumed if state does not meet six-month time frame.

8. If state objects, Federal agency cannot issue approval.

9. Applicant may renegotiate with state to remove state's objection or appeal the state's objection to the Secretary of Commerce within 30 days of the objection. If the Secretary overrides the state's objection, the Federal agency may approve the project. If the Secretary does not override the state's objection, the Federal agency cannot approve the project.

OCS Plans

A private person or business applying to the U.S. Department of the Interior's Minerals Management Service (MMS) for outer continental shelf (OCS) exploration, development and production activities needs to follow the requirements of CZMA section 307(c)(3)(B)(16 USC § 1456(c)(3)(B)) and 15 CFR part 930, subparts A, B and E. The basic requirements for Federal agency activities are:

1. Any person who submits to MMS an OCS plan for the exploration of, or development and production of, any area leased under the Outer Continental Shelf Lands Act, must certify to the relevant state CMPs that any activities described in detail in such OCS plans will be conducted in a manner consistent with the state CMPs.
2. The process and requirements for this section generally mirror those of federal license or permit activities discussed above. State must notify applicant if state review will extend beyond three months, otherwise state's concurrence is presumed.

Federal Financial Assistance Activities

A state agency or local government applying for federal financial assistance needs to follow the requirements of CZMA section 307(d)(16 USC § 1456(d)) and 15 CFR part 930, subparts A, B and F. The basic requirements for Federal agency activities are:

1. States list in their CMPs the federal financial assistance activities subject to review. The state CMP may also notify an applicant agency and Federal agency that it will review an unlisted

activity. OCRM approval is not required for the review of unlisted federal financial assistance activities.

2. NOAA regulations allow state CMPs to develop flexible procedures for reviewing and concurring with federal assistance activities. State CMP review of the activities is normally conducted through procedures established by states pursuant to Executive Order 12372 -- intergovernmental review of federal programs, or through state clearinghouse procedures.

3. Federal agency may not issue the funding until state CMP has concurred.

4. State or local government applicant agency may appeal state objection to the Secretary of Commerce who may override the state's objection.

Other Federal Actions

The Federal agency activity category, 15 CFR part 930, subpart C, is a "residual" category. A federal action that will have reasonably foreseeable coastal effects, but which does not fall under 15 CFR part 930, subpart D (federal license or permit), subpart E (OCS plans), or subpart F (financial assistance to state agency or local government), is a Federal agency activity under subpart C. For example, if a Federal agency is providing funds to a private citizen for disaster relief from a hurricane, and the funds will be used for an activity with coastal effects, then the Federal agency must follow the requirements for Federal agency activities and provide the state CMP with a Consistency Determination.

Mediation of Disputes

In the event of a serious disagreement between a state CMP and a Federal agency, either party may request that the Secretary of Commerce mediate the dispute. All parties must agree to participate, agreement to participate is non-binding, and either party may withdraw from the mediation at any time. Secretarial mediation is a formal process that includes a public hearing, submission of written briefs, and meetings between the parties. A hearing officer, appointed by the Secretary, will propose a solution. Secretarial mediation is only for states and Federal agencies. Exhaustion of the mediation process is not a prerequisite to judicial review.

The availability of Secretarial mediation or litigation does not preclude the parties from informally mediating the dispute through OCRM or another facilitator. OCRM has successfully mediated disputes and offers its good offices to resolve conflicts. Most disputes are addressed through this informal method. Either party may request OCRM involvement, and participation is non-binding.

Appeals to the Secretary of Commerce

The CZMA provides an administrative appeal to the Secretary of Commerce from a consistency objection by a coastal state. In the case of a federal license or permit, an OCS oil and gas plan, or an application for federal financial assistance, the applicant may request that the Secretary override the state's objection if the activity is consistent with the objectives of the CZMA (Ground I), or is otherwise necessary in the interest of national security (Ground II). 16 USC § 1456(c)(3)(A),(B), and (d). Secretarial appeals are not available for Federal agency activities. The requirements for appeals are found at 15 CFR part 930, subpart H. Both states and applicants should pay close attention to the appeal process in the regulations. In addition, states need to adhere to the consistency review time periods, six-month stay provisions and objection requirements. Otherwise, the Secretary may override the state's objection on procedural grounds.

If the requirements of either Ground I or Ground II are met, the Secretary overrides the state's objection. The Secretary's inquiry into whether the grounds for an override have been met is based upon an administrative record developed for the appeal. While the Secretary will review the state objection for CZMA compliance, e.g., whether the objection is based on enforceable policies, the Secretary does not review the objection for compliance with state laws and policies.

If the Secretary overrides the state's objection the authorizing Federal agency may permit or fund the activity. A secretarial override does not obviate the need for an applicant to obtain any state permits or authorizations. Factors influencing the appeal process time include: nature and complexity of the dispute, stays requested by one of the parties, public hearings, and briefing schedules.

The Secretary appeal process is final Federal agency action under the Administrative Procedure Act and is a necessary administrative action prior to litigation. *See* OCRM's Federal Consistency web page at: **www.coastalmanagement.noaa.gov/czm/federal_consistency.html** for a list of all CZMA appeals filed with the Secretary. In addition, the NOAA Office of General Counsel has a separate website containing Decisions of the Secretary and the administrative records of ongoing appeals: **www.ogc.doc.gov/czma.htm**

Interstate Consistency

The regulations were revised in 2000 to provide a process for a coastal state to review a federal action occurring in another state that will have coastal effects in the reviewing coastal state, referred to as "interstate consistency." The new requirements combine with the requirements under the various types of federal actions. The interstate regulations are found at 15 CFR part 930, subpart I.

OCRM's interstate consistency regulations were established to provide a process for reviewing federal actions in another state that would involve greater coordination and consultation between states and Federal agencies, as well as provide notice to neighboring states and Federal agencies and applicants proposing federal actions in nearby states.

OCRM established a consultation and notice process with which states have to comply before reviewing federal actions in nearby states. Consistent with CZMA section 307(c)(3) and NOAA's regulations at 15 CFR part 930, subpart D (federal license or permit activities), OCRM could require states to complete this upfront consultation and notice prior to reviewing interstate activities. However, because the CZMA places the burden on Federal agencies to ensure a consistency determination is submitted for any activity

with coastal effects, OCRM could not impose this same consultation requirement for Federal agency activities under CZMA section 307(c)(1) and 15 CFR part 930, subpart C. Therefore, 15 CFR § 930.155(a) recognizes that Federal agencies proposing activities located in one state, which have reasonably foreseeable coastal effects in another coastal state, must comply with 15 CFR part 930, subpart C, even if the affected coastal state has not completed the interstate consultation and notice processes described in 15 CFR §§ 930.153 and 154. The intent of 15 CFR § 930.155(a) is that all requirements of 15 CFR part 930, subpart C will apply in these cases, including the federal agency submitting a consistency determination to the state and the state's opportunity to concur or object within the statutory and subpart C regulatory time periods.

Information that Should Be in State Objection Letters

State objection letters under the CZMA federal consistency regulations should include the following information:

1. The objection (or conditional concurrence) must be based on enforceable policies that are part of the state's federally approved CMP.

2. The objection letter must describe ***how*** the activity is inconsistent with specific enforceable polices.

3. The objection must be timely. An objection letter should include the date the complete Consistency Certification or Consistency Determination and necessary information was received by the state. The state's objection letter should also include the date that the state provided a three-month notice to the applicant for a federal license or permit activity describing the status of the state's review. For federal license or permit activities and OCS plans, if applicable, the state's objection should also document the date the state provided the 30-day "completeness" finding under 15 CFR § 930.60(a). The objection letter should also document any agreements to stay or extend the six-month review period.

4. For federal license or permit activities, OCS oil and gas plans, or financial assistance activities, the objection letter must advise the applicant, person or applicant agency, of the right to appeal the state's objection to the U.S. Secretary of Commerce (with a copy to NOAA's Office of General Counsel for Ocean Services) within 30 days of receipt of the letter and should provide the addresses for the Secretary and NOAA General Counsel that are described in NOAA's regulations at 15 CFR § 930.125(c).

5. If the objection is based on insufficient information, the objection letter must describe the nature of the information requested and the necessity of having that information to determine consistency and the date this information was requested during the state's review period.

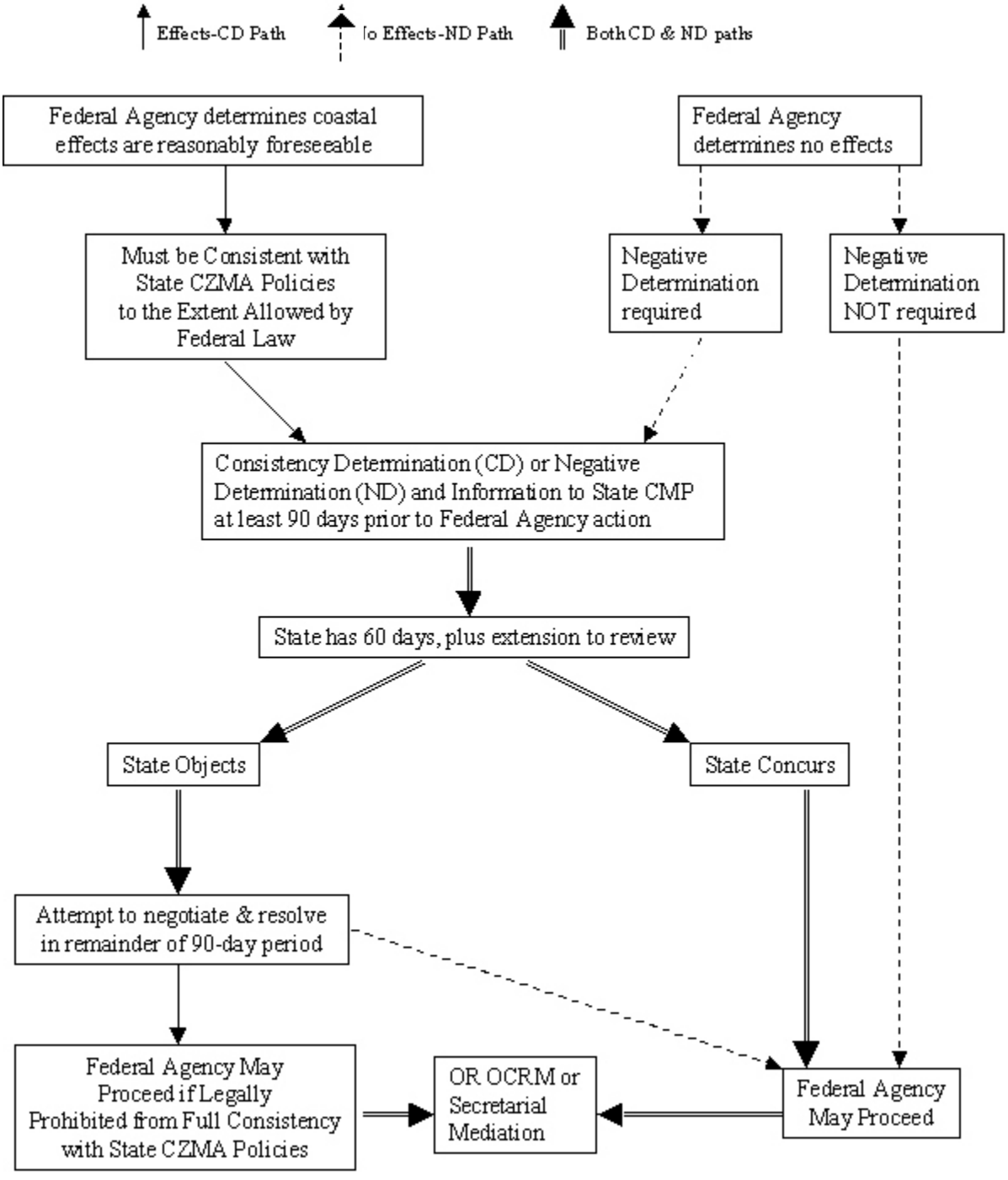
6. An objection letter should include alternatives that would be consistent with the state's CMP enforceable policies. Consistent alternatives should be described with as much specificity as possible to allow the applicant, or the Secretary of Commerce, to determine if the alternatives are available and reasonable.

7. The objection letter must be sent to the applicant, the appropriate Federal agency, and the Director of OCRM.

Appendix A: Summary of Federal Consistency Provisions

	Federal Agency Activities & Development Projects	Federal License or Permit Activities	OCS Plans: Exploration Development & Production	Federal Assistance to State and Local Govts.
CZMA Section 307	(c)(1)&(2)	(c)(3)(A)	(c)(3)(B)	(d)
Activity subject to review, if it ...	Affects any land or water use or natural resource of the coastal zone	Affects any land or water use or natural resource of the coastal zone	Affects any land or water use or natural resource of the coastal zone	Affects any land or water use or natural resource of the coastal zone
Consistency requirement	Consistent to maximum extent practicable with state CMP enforceable policies	Consistent with state CMP enforceable policies	Consistent with state CMP enforceable policies	Consistent with state CMP enforceable policies
Who decides effects?	Federal agency	State CMP and OCRM	State CMP and OCRM	State CMP and OCRM
Time limit	60 days, plus 15 day extension	6 months	3 months - state may extend to 6 months	Clearinghouse schedule
Impact of State Objection	Federal agency may proceed only if cite legal authority as to why it must proceed or that it is fully consistent	Federal agency may not issue permit, license, or other approval	Federal agency may not approve plan or issue permits	Federal agency may not grant assistance
Administrative conflict resolution	Mediation by the Secretary of Commerce or OCRM (voluntary, non-binding)	Appeal to the Secretary to override State objection	Appeal to the Secretary to override State objection	Appeal to the Secretary to override State objection

Appendix B: Federal Agency Activities Flow Chart
(CZMA § 307(c)(1); 15 CFR part 930, subpart C)



Appendix C: Federal License or Permit Activities Flow Chart
(CZMA § 307(c)(3)(A); 15 CFR part 930, subpart D)